



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: RCI Management, Inc.

File: B-239938

Date: October 12, 1990

John M. Taffany, Esq., Bailey & Shaw, P.C., for the protester. Herbert F. Kelley, Jr., Esq., and Sophia L. Rafatjah, Esq., Department of the Army, for the agency. George Ruppert, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the contracting agency improperly failed to reconsider nonresponsibility determination in light of new information submitted by a third party to the contracting officer before award, but after Small Business Administration declined to issue certificate of competency, is denied where record indicates that the contracting agency did consider the evidence presented and reasonably determined that reversal of the nonresponsibility determination was not warranted.
2. Where bidder properly was found nonresponsible, its protest challenging cancellation of solicitation is dismissed, since firm would not be in line for award if the protest were sustained, and thus is not an interested party under General Accounting Office Bid Protest Regulations.

DECISION

RCI Management, Inc. protests its rejection as nonresponsible and the cancellation of invitation for bids (IFB) No. DAKF24-90-B-0010, issued by the Department of the Army as a total small business set-aside for maintenance of family housing at Fort Polk, Louisiana. RCI principally contends that the contracting officer improperly failed to consider new information submitted after the Small Business Administration's (SBA) refusal to issue a certificate of competency (COC), but before award, which it believes warranted reversal of the contracting officer's and SBA's finding that the firm was nonresponsible.

We deny the protest in part and dismiss it in part.

049725/142 438

Seven bids were received in response to the IFB; RCI was the fourth-low bidder. The contracting officer determined the four lowest bidders, including RCI, to be nonresponsible; he concluded on April 27, 1990, that RCI was nonresponsible because it lacked adequate financial resources, understanding of the contractual requirements, and necessary organization, experience, accounting/operational controls and technical skills. Since all four firms were small businesses, the contracting officer forwarded his determinations to the SBA for possible issuance of a COC. On May 30, the SBA declined to issue a COC to any of the firms, including RCI; the SBA found RCI had failed to demonstrate that it could provide the craftsmen, management and spare parts and equipment necessary to perform the contract.

On June 1, Midland Maintenance, Inc. faxed a letter to the Army stating that Midland had entered into a binding agreement to purchase 100 percent of RCI's stock, and requesting the contracting officer to reconsider the question of RCI's nonresponsibility on this basis. The letter also indicated that the stock purchase was contingent upon RCI's receipt of the Fort Polk contract.

On June 5, Midland asked the Army whether additional information concerning the responsibility of RCI had been considered. The agency informed Midland that RCI had not submitted any additional information but that the information contained in Midland's June 1 letter had been considered and RCI's nonresponsibility reaffirmed. On the same day the agency made a determination to cancel the IFB on the basis that the specifications and workload data had been revised, the services identified on the bid schedule no longer were required, and the only otherwise acceptable bid was unreasonably priced since it was approximately 22 percent above the government estimate for the base year and 15 percent above the estimate for the option period. This protest followed.

RCI contends that the agency improperly refused to consider the new information bearing on its responsibility which Midland submitted to the agency after the SBA declined to issue a COC. This information consisted of the June 1 notice of a binding agreement from Midland, an experienced government services contractor, to purchase 100 percent of RCI's stock, contingent upon award of the contract to RCI; financial statements of Midland; resumes for three individuals who would be working on the contract, showing their extensive backgrounds in housing maintenance; and material from the local employment commission confirming that the specific trades needed to perform the contract were available to Midland in quantities in excess of that needed to perform the contract. The protester concludes that if the new information submitted by Midland had been considered, RCI would have been determined

the low responsive and responsible bidder with a reasonable price and that there thus would have been no compelling reason to cancel the IFB. RCI requests that the cancellation of the IFB be rescinded and that it be determined responsible and given the award. Alternatively, RCI requests reimbursement of its bid preparation expenses.

The SBA has conclusive authority to review a contracting officer's negative determination of a small business concern's responsibility, and thus to ultimately determine the concern's responsibility, by issuing or declining to issue a COC. 15 U.S.C. § 637(b)(7) (1988). However, where new information bearing on a small business concern's responsibility is presented after a COC has been denied but before award, the contracting officer may reconsider a nonresponsibility determination. Eagle Bob Tail Tractors, Inc., B-232346.2, Jan. 4, 1989, 89-1 CPD ¶ 5; Reuben Garment Int'l Co., Inc., B-198923, Sept. 11, 1980, 80-2 CPD ¶ 191. Our review in these circumstances is limited to determining whether the contracting agency's reassessment was reasonable. Eagle Bob Tail Tractors, Inc., B-232346.2, supra.

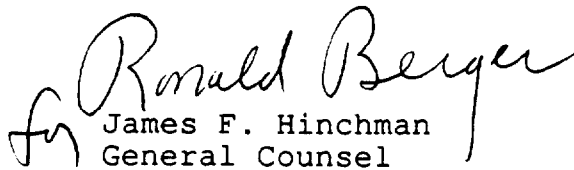
We find that, contrary to RCI's assertion, the agency did consider the information submitted by Midland, and that the agency's decision not to change its nonresponsibility determination based on that information was reasonable. The Army's affirmation of its and the SBA's nonresponsibility determinations in the face of Midland's information was based on several factors. First, the agency was concerned that Midland, not RCI, had presented the new information and that RCI had not even contacted the Army to confirm that the purported arrangement was being entered into. Second, although Midland asserted that a binding agreement existed, Midland did not furnish a copy of the agreement to the Army. Finally, the Army noted that the so-called binding agreement in fact was conditioned on RCI's receipt of the award under this procurement.

We find nothing objectionable in the manner in which the Army viewed Midland's information. As RCI never contacted the Army after denial of the COC, we think the Army legitimately questioned the extent and nature of the relationship between the two firms. RCI's and Midland's failure to furnish the agency with a copy of the purported binding purchase agreement gave the agency cause to question whether the terms of the agreement were as Midland represented, and even whether such an agreement in fact existed. The reasons for RCI being found nonresponsible--including inadequate financial resources and accounting/operational controls--could not be cured merely through transfer of ownership to Midland and employment of three experienced individuals by RCI. Binding commitments by Midland in excess of an equity interest would be necessary.

Not only was a record of such commitments not provided to the Army, but one was not provided to this Office in connection with RCI's protest. Although RCI asserts that the Army should have requested a copy of the agreement, it is incumbent upon the bidder--particularly under the circumstances here, where both the agency and the SBA already have determined the bidder nonresponsible--to provide any information necessary to establish that it in fact is responsible. See Theodor Arndt GmbH & Co., B-237180, Jan. 17, 1990, 90-1 CPD ¶ 64.

Concerning RCI's protest against cancellation of the IFB, under the Competition in Contracting Act of 1984 (CICA), our Office will only decide a protest filed by an "interested party," which CICA defines as an "actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." 31 U.S.C. § 3551(2) (1988); 4 C.F.R. § 21.0(a) (1990). A party is not interested to maintain a protest if it would not be in line for award if the protest were sustained. See HTP Enters., Inc., B-235200, Apr. 27, 1989, 89-1 CPD ¶ 418. In view of our conclusion that the contracting officer properly found RCI nonresponsible, RCI lacks the direct economic interest necessary to be an interested party eligible to protest the cancellation. Id.

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel